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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 254.

OTIS & CO., *Appellant*,

v.

THE UNITED STATES OF AMERICA, THE PULLMAN COMPANY, PULLMAN-STANDARD CAR MANUFACTURING COMPANY, PULLMAN INCORPORATED, *et al.*

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

REPLY BRIEF FOR OTIS & CO., APPELLANT.

The issues on which this case must be decided have, we think, been ingeniously obscured and then ignored in the briefs filed by Pullman Incorporated and the Railroads. Our purpose in reply will, therefore, be to bring the argument back to a discussion of those issues.

Opposing Theories as Developed by the Briefs.

The central proposition on which we believe this case must be decided is this: It is the duty of a court in an anti-trust reorganization proceeding to use its equity power to

reestablish a condition of expanding competitive development in an industry in which competition has been destroyed by a combination in restraint of trade. We submit that this is the purpose of every antitrust reorganization. If the court has no such duty, all the language formerly used by this Court concerning the purposes of the antitrust laws becomes meaningless. And if an action must stop short of its objective, the antitrust law itself ceases to be a charter of freedom in industry. We have argued this principle extensively in our brief, and we think we have established it.

The counter-proposition put forward by Pullman Incorporated, and adopted by implication in the Railroads' brief, is the exact contrary. The underlying principle which the respondents regard as controlling is stated in the summary of argument of Pullman Incorporated, as follows:

> "The Court kept steadily in mind the proposition that this is *not* a reorganization proceeding but merely a forced sale of corporate property which, if consummated, would completely destroy the monopoly the destruction of which was the Court's responsibility." (Pullman Br. 12)

The principle on which the opposition briefs rest means three things: (1) that the court has no responsibility to use its equity powers to dissipate the consequences of a former monopoly; (2) that the probability that a new monopoly will be substituted for the old one is no concern of the court; (3) that the dissolution of a vast combination is not an equity reorganization and that, therefore, in the steps it takes to effect the dissolution the court may ignore the fundamental principle of the antitrust laws that—so far as its powers are adequate—competition must be restored.

We are not enlightened by the briefs of the appellees why it is not the continuous duty of the court to enforce the policy and purpose of the Act throughout all the stages of the proceedings. We are not told why the public interest, paramount in the task of discovering the wrong-doing,

should be ignored in the constructive task of guarding against the return of the evil.

In support of its contention, a quotation from a District Court decision is cited by appellees which, taken out of context, might seem to indicate that the court considered the public interest irrelevant. *United States* v. *Columbia Gas and Electric Corp.*, 36 F. Supp. 488, 495. (Pullman Br. 18-19). The balance of the quotation, omitted in the Pullman brief, reads as follows:

> "The Government has taken the position that the plan submitted, with certain modifications which this Court has approved, will be effectual to accomplish the relief sought. The City of Detroit has harkened back to a plan of divestiture not developed at the hearings or considered by the special master and not before the Court."

Certainly this does not support the proposition for which it is cited that a court, after taking evidence on competing plans in an anti-trust reorganization, has no power to determine which plan will best carry out the purpose of the proceeding and the policy of the Act.

The cases which we cite to the contrary are not distinguished, or even referred to, in respondents' briefs. These cases seem to us clearly to demonstrate that, when the court is called upon to use its equity power in an antitrust action, it is always under obligation to take account of the policy of the Act and of the public interest.

On the basis of their unargued assumption, isolating the sale of The Pullman Company from the antitrust action in which it is set, the brief of The Pullman Company constantly refers to the decree of May 8th as the Final Judgment. Having so isolated the sale from the entire proceeding, the briefs of the appellees treat the order of March 22nd as a form of ejectment proceedings which has no relevance to the purposes of the antitrust law. This order directs The Pullman Company to select a bidder for the property from available persons, including the railroads. The

assumption of the opposition briefs is that, with the finding of such a bidder by Pullman Incorporated, the proceeding is ended and the authority of the court exhausted.

In this situation the issue presented by the opposing briefs is simple. Pullman and the railroads are asking this Court to regard the steps through which The Pullman Company passes into new hands and is reorganized as nothing more than a private sale of property,—to allow an equity reorganization, ordered because of violation of the anti-trust laws, to be effected by private parties,—and to sanction a sale by Pullman Incorporated to the bidder of its choice without any further consideration of the purpose of the Act or the public interest. We are insisting that throughout the proceeding the purpose of the Act must be implemented to the fullest extent possible by the use of the broad equity powers of the court.

If the principle which we urge governs this case, there can be no escape from the court's duty to evaluate the several bids in the light of the purpose and policy of the proceeding and of the Antitrust Act. It is admitted by all parties that the court did not perform this duty. Its avowed failure to do so, we insist, is reversible error. That simple proposition is all that this Court has to decide.

The Argument Against the Otis Bid.

That the railroads feel some uneasiness about the validity of the underlying principle on which their case rests is found in Section IV of their brief. There they insist—speculatively and without argumentative support—that the public will lose money if Otis & Co. replaces the present fleet of Pullman cars with new equipment; and that, therefore, the bid is financially unsound. We insist that the record contains adequate evidence to the contrary. Indeed, their contention seems at variance with the judgment of the court below where, after the limited consideration which it gave to the independent bids, it said: "Approval of the sale to the railroads does not imply disapproval of other

bidders. We are much impressed with all of them." (R. 1199) It thus appears that insofar as the court made any finding it was that the Otis bid was one which the court might have accepted had it believed it had the authority to evaluate the bids in the light of the purposes of the Act.

In any event, the protection of investment urged by the railroads as a test is of minor significance. Of course the court should not approve an unworkable scheme. But the purpose of the antitrust law is not to create security for investment but rather the opportunity for new enterprises which seek outlets for capital. It seeks, through the willingness of individuals to take the business chance of win or lose, to increase production of goods or services. How thoroughly the railroads misunderstand the purpose of the antitrust law is shown by their argument that, if the court evaluates the bids at all, it is its duty to discourage speculative enterprise in the sleeping car business.

We will not labor this point since the question is not before the Court at this time. It is the duty of the trial court to weigh the qualifications of the prospective bidders in the light of the purpose and policy of the Act. The purpose of this appeal is only to remand the case to the trial court with directions to evaluate the bids on the proper criteria.

Contrary to the contentions of Pullman, Incorporated,[1] and of the railroad combine,[2] the offer of Otis & Co. was an offer to purchase the stock of The Pullman Company for cash at the price fixed by Pullman, Incorporated. Witnesses for Otis & Co. so testified[3] and the following statement was made thereon by counsel in open court:

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[1] Brief of Pullman group, pp. 7, 8.

[2] Brief of Railroad Buying Group, pp. 51, 52.

[3] R. 2036, 2085. Witnesses for Otis & Co. also testified that funds for this purchase would be supplied without public financing. (R. 2036, 2085) In this relation, a member of the Otis group testified:

> "Q. Mr. Young, you say that you consider yourself personally bound in this obligation that Otis and Company has made by its offer, is that right?

"The financial commitments undertaken by Otis & Company and its associates in connection with their purchase of the Pullman Company may be stated as follows:

Otis has agreed to purchase outright for cash in the sum of approximately forty million dollars the Pullman Company with its assets consisting of shops, laundries, supplies (including working capital) and heavyweight equipment all subject to inventory and audit. Otis has also agreed to purchase all or any of the lightweight equipment on the basis of Pullman's depreciated book value of thirty-five million dollars. These offers are for cash and without any qualifications other than those stated." (R. 2586)

This statement is categorically restated before this Court to remove any question as to the nature of the Otis offer[4] and to assure this Court that a bidder, independent of any relationship to the monopoly interests that have dominated Pullman in the past, is ready, willing and able to purchase The Pullman Company.

A. I do, indeed.

Q. And do your associates consider themselves personally bound?

A. Mr. Kirby does.

Q. And have you and your associates agreed upon what proportion of the commitment each of you will assume?

A. We have an understanding.

Q. And what is that understanding?

A. Roughly, that Mr. Kirby and I will finance fifty percent of the transaction, and Otis and Company will finance the other fifty percent." (R. 2074, 2075)

[4] Now that the I. C. C. proceeding in Docket No. 29592 has been so extensively referred to by appellees, it is appropriate to refer to testimony of witnesses for the railroad combine, as follows:

"Q. (By Bulkley): I will ask him if he knows whether the railroads at first attempted to close with the Pullman Company on basis considerably lower than the Pullman Company offers of May.

A. Yes, we had a bargaining position at that time and we are attempting to use it.

Q. What caused you to change and give up?

A. I was disappointed and it was brought about by the testimony of Mr. Young in the District Court changing the offer to cash in full." (TR. 107)

The Interstate Commerce Commission Proceeding.

A large part of the briefs both of the railroad combine and Pullman is devoted to the proceeding now before the Interstate Commerce Commission in which the railroad combine seeks approval, (under Section 5(1) of the Interstate Commerce Act as amended) of their purchase of the stock of Pullman Incorporated, on the ground that in connection with that purchase they proposed to operate an alleged pool.

This proceeding is irrelevant to the issues before the Court. No approval by the Commission of the alleged pooling transaction can carry with it jurisdiction to approve or pass on the proposed purchase of the stock of The Pullman Company. The Interstate Commerce Act gives the Commission no power to pass upon the sale or disposition of Pullman stock. Indeed, that power was by Congress specifically withheld from the Commission.[5]

Nor is it the function of the Commission to advise the Court as to how the reorganization of Pullman service should be carried out in order to realize the objectives of the present proceeding. The Commission has no concern with the question whether the stock of The Pullman Company should be sold to the railroads or to one of the independent bidders.

These questions, at issue in this action, must be decided by this Court and can be referred to no administrative agency.

The railroads are attempting to get an approval from the Commission alleging that the consequences of the acceptance of their plan involves a pooling operation within the jurisdiction of the Commission. Otis & Co., The Chesapeake & Ohio Railroad Company, et al., and the Government are contending before the Commission that the agreements made in connection with the railroads' plan of pur-

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[5] Section 5 (13), Interstate Commerce Act.

chase do not involve a pooling operation within the meaning of the Act and hence the Commission has no issue before it within its jurisdiction. Whatever the Commission may decide on this question has no relation to the legality of the court's selection of the plan of the railroad combine as the method of carrying out its decree of dissolution.

The agreements which were approved by the District Court provided for an absolute sale of the Pullman stock to the railroad combine. The contract arrangements presented to the Commission and alleged by the railroad combine to be a pool were never before the court. They are only an off-shoot of the proposed railroad purchase. They are entirely dependent upon the final approval of the sale of stock to the railroad combine. We do not believe that the Commission should give an advisory opinion dependent upon an arrangement which is not yet confirmed by the Court. However, conceding the right of the railroads to seek such an advisory opinion, it is certainly not the function of the Commission to go further and advise the Court whether the sale of the stock of The Pullman Company to the railroads is an appropriate means of carrying out the court's decree of dissolution of the Pullman combination of manufacturing and sleeping car services.

To put the matter in another way: Suppose the railroads had secured in advance of their offer an advisory opinion from the Interstate Commerce Commission that the proposal would be approved as a pool. If such an advisory opinion were proper, which we deny, it could only amount to a representation to the Court that the railroad proposal was one of the possible methods of carrying out the dissolution of the combination of manufacturing and sleeping car business. We submit that nothing which the Commission can do in the proceedings now before it has any relevance to this appeal until this Court has decided whether or not the decision and order of the court below approving the railroad proposal are based upon an appropriate exercise of the court's equity powers and an application of the proper criteria to the bids before it.

Nor should the minor place of the alleged pooling operation in the general railroad plan be overlooked. The alleged pool submitted to the Commission for approval is a single short-run feature of the railroad plan to select its own nominee as final purchaser of the Pullman service. The railroad acquisition is to be for an interim period, an expediency contrived by the railroads to meet an emergency. The purpose of the proposed pool is not to create as an integral part of the railroad structure a new joint service, but to give the railroads time to select and install a successor to The Pullman Company. That duty rests upon the court below and cannot be delegated.

The sale has consequences to the whole of the national economy; and in respect to its purpose and terms the Commission has no authority. Nor can a decision of an administrative question by the Commission be made to stretch to, or to dispose of, the antitrust issue before the Court. Nor can the smaller responsibility of the Commission in respect to a pool be made a substitute for the larger responsibility of the court to rid the national economy of a monopoly. Behind the facade of the Commission proceeding there is no warrant for allowing the railroad combine, even after a discreet interval, to install the successor to The Pullman Company. The limited power of the Commission to decide a specific question gives no color of excuse to pinch hit for the court in the performance of a public duty.

If the railroads were the only bidder, if for want of an alternative the sleeping car business had to be passed along to them, it might be proper for them—after the final judicial approval of the sale—to appeal to the Commission for an approval of whatever plan of joint operation seemed expedient, though no Interstate Commerce Commission approval of the acquisition would be needed. But the court below is confronted not by one, but by four offers to buy, and it is under a duty to select that one which gives the greatest promise of permanently ridding the industry of the monopoly. Accordingly, the issue of the pool,

which the railroads attempt to present to the Commission, is an if-as-and-when question. It can become a justiciable issue only as a consequence of the lawful selection of the railroads as the successful bidder by the court. When —as here—the lawfulness of the sale is in dispute, the issue before the court can not be resolved by the administrative approval of the possible joint use to which such facilities can be put—if acquired. In a word the fallacy of the argument of the railroad combine is that it confuses the right to pool with the right to judicial approval of their offer.

Conclusion.

The question presented by this appeal is whether the court below had a duty to make a comparative evaluation of the plans before it in the light of the purposes of the proceeding and the policy of the Antitrust Act. All other issues are irrelevant. We submit that the judgment of the court below should be reversed and the case remanded with directions to evaluate the bids according to the policy of the antitrust laws.

Respectfully submitted,

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